to account to them in the Orphans' Court." The last part of this sentence suggests the possibility that the court only wishes to say that the Orphans' Court has jurisdiction of express trusts only, and that therefore this case belongs to the Court of Common Pleas. If so, their expressions are most unfortunate; and it really seems impossible to escape the belief that they intend to say that a municipal corporation is not liable as constructive trustee when an express trust fails, so that an individual would be liable. A corporation, they say, being the creature of law, "can have only those capacities which are imparted, and exercise only those powers which are expressly, or by necessary implication granted to it. . . . In the absence, therefore, of an express grant of power to accept and hold property upon purely private trusts, and to execute such trusts, it can no more do so than can a nonentity." This last point is the only one on which they quote authorities, — one a dictum from Judge Sherwood, who is speaking of express trusts, and says that a municipal corporation cannot administer them for purely private purposes; the other, *Mayor* v. *Elliott*, 3 Rawle, 170, where nothing is said on the subject, and the decision is that certain trusts were good, as among the objects for which the corporation existed.

After supporting a point not in issue by this brilliant array of authorities, the court quickly assumes that a city can be constructive trustee in no case where it could not be express trustee. "Where a trust is implied contrary to intention, as would be the case here, the implication is a fiction of the law inserted to prevent a failure of justice. But the law will not resort to a fiction that will defeat its own policy by converting into a trustee a municipal corporation from which it has, for the public good, withheld capacity to accept and administer the trust."

Why this reasoning would not apply to an individual trustee, they do not state. It would be superfluous to quote authorities to show that the decision is as bad law as it is bad sense. Several cases are collected in *Chapman* v. *Co. of Douglas*, 107 U. S. 348. A good statement of the law is this from Chief Justice Field, in *Pimentel* v. *City of San Francisco*, 21 Cal. 362: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake or without authority of law, it is her duty to refund it, from the general obligation. If she obtains other property which does not belong to her, it is her duty to restore it, or if used, to render an equivalent therefor, from the like obligation. The legal liability springs from the moral duty to make restitution."

WAGERING CONTRACT: A QUESTION OF DEFINITION. — In *Carlill* v. *Carbolic Smoke Ball Co.* (1892), 2 Q. B. 484, Hawkins, J., gives us a definition of wagering contract. In view of the prominence or contracts in "futures," and the unsatisfactory grounds of their decisions, some analysis of this definition may be of service. The question was raised on curious facts. The Smoke Ball Co., by public notice, offered £100 to whomsoever contracted the increasing epidemic influenza colds after using their carbolic smoke ball daily for two weeks. The plaintiff did so use the smoke ball, and contracted the cold; and the defendant now contends that it is a wagering contract, as the liability depended on events beyond control of the parties.

Hawkins, J., deciding that it was not a wagering contract, put forward the following definition: "A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of the event, one shall win from the other, and the other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in the contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract, that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win, but cannot lose, or may lose but cannot win, it is not a wagering contract. It is also essential that there should be mutuality in the contract."

This seems to reduce to the following essentials: —

1. A mutual agreement of two that, according to the issue of a future uncertain event, one shall receive from the other a stake.

2. The necessity that each party may win or lose.

3. That neither party shall have any interest other than the stake he is to win or lose.

4. Mutuality of intent so to hazard.

Query might well be made whether the uncertain event must be future; elaboration is needed of the term "stake;" and emphasis ought to be laid on the fourth requisite. But it is the third that requires attention.

Let it be tested by applying the definition to contracts of insurance. Now policies of insurance taken out by those who have no interest in the insured property or life are unenforceable, as being wagering contracts (*Howard* v. *Albany Ins. Co.*, 3 Denio, 301; *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457); while policies taken out by those having a proper interest are binding. The necessary elements of contract are present in both classes; the difference only in the point of interest. They are both the same in their nature, — wagers: but for reasons of public policy one class is allowed, and the other not allowed.

Under the above third term, however, one will be termed a wagering contract, and the other not.

True, it makes no practical difference in the rule of law of to-day whether we say all unenforceable contracts of hazard are wagering contracts, and contracts of hazard in which the party has a proper interest are not unenforceable, or whether we say all contracts of hazard in which the party has no proper interest are unenforceable. But as a matter of accuracy and proper terminology, the rule should be stated in the last form. And if in the future, public policy shall dictate that other contracts of hazard shall be added to the class of contracts of insurance, and be enforceable, then the rule will be in the proper shape; namely, that all are alike wagering contracts, but some wagering contracts the courts will enforce, while others they will not enforce.

The principal case might have been decided on grounds 2, 3, or 4. The decision went on ground 2.

This distinction is suggested in Anson on the Law of Contracts, p. 183; and the definition of Hawkins, J., may be reduced to Anson's definition by striking out term 3.